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82-504

In the Supreme Court of the United States

October, 1982 Term

No. _____

EMMA S. ARMIJO, Personal Representative of the Estate of Annette Armijo, Deceased.

Petitioner,

vs.

MATTHEW A. TANDYSH, M.D.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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QUESTION REPRESENTED

Whether the classifications established by the New Mexico Medical Malpractice Act, Sections 41-5-1-28 N.M.S.A. 1978 violate the guarantees of Due Process and Equal Protection of the laws found in the 14th Amendment of the United States Constitution.

In the Supreme Court of the United States

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No. _____

EMMA S. ARMIJO, Personal Representative of the Estate of Annette Armijo, Deceased.

Petitioner,

vs.

MATTHEW A. TANDYSH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

The Petitioner, Emma S. Armijo, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the New Mexico Court of Appeals which was entered September 8 1981, and the quashing of the Writ by the Supreme Court of the State of New Mexico on June 15, 1982.

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OPINION BELOW

The Opinion of the New Mexico Court of Appeals in Armijo v. Tandsh has not yet been reported in New Mexico Reports, though it does appear at 646 P.2d 1034 (Ct. App. 1982). It also appears in the Appendix. The New Mexico Supreme Court's denial of Petitioner's Writ of Certiorari also appears in the Appendix.

JURISDICTION

The Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code, Section 1257 on the grounds that a New Mexico State Statute, as interpreted and justified by the highest Court in New Mexico to render an opinion in this case, is repugnant to the United States Constitution and the rights, privileges and immunities guaranteed to the United States citizens under Federal law. The opinion which Petitioner seeks to have reviewed by this Court was rendered by the New Mexico Court of Appeals, the highest New Mexico Court having jurisdiction over this case to render a decision. The Supreme Court of the State of New Mexico quashed as improvidently granted Petitioner's timely Petition for Writ of Certiorari on June 15, 1982, almost 8 months after it had accepted Certiorari.

QUESTION PRESENTED

Whether the classifications established by the New Mexico Medical Malpractice Act Sections 41-5-1-28 N.M.S.A. 1978 violate the guarantees of Due Process and Equal Protection of the laws found in the 14th Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV — Section 1 — United States Constitution

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without Due Process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Emma S. Armijo is a Mexican-American natural mother of decedent residing in Albuquerque, New Mexico. She is serving as the Personal Representative of the Estate of her daughter Annette Armijo, who died on September 3, 1977, at the age of 11. Respondent, Annette's pediatric physician, had diagnosed Annette as a juvenile diabetic on or about July, 1976, and knew that her condition was extremely serious. A few months after this diagnosis Annette developed an abcess between her rectum and vagina caused by an infection. Respondent did not check her blood sugar levels, even though this is a basic, crucial procedure whenever a diabetic undergoes any type of stress or infection. Respondent merely treated the infection. Annette went home, lapsed into a keto acidotic coma that night which lasted almost four months until her death. The New Mexico Medical Review Commission agreed unanimously that Respondent had committed malpractice.

Petitioner as Personal Representative of her daughter's estate filed a complaint against Respondent in the New Mexico District Court for Bernalillo County on August 15, 1980, pursuant to the New Mexico Wrongful Death Act, §§41-2-1 et seq., N.M.S.A. 1978. Her complaint alleged negligence on the part of Respondent which proximately caused the death of her daughter.

Respondent filed a Motion to Dismiss the complaint on September 24, 1980. In his motion, Respondent asserted that Petitioner's claim was barred by the statute of limitations set forth in §41-5-13 N.M.S.A. 1978, which provides that a claim for medical malpractice must be filed within 3 years after the date that the malpractice occurred. Petitioner argued that the appropriate statute of limitations is that of the Wrongful Death Act, §41-2-2 N.M.S.A. 1978, which provides that a claim for wrongful death must be brought within 3 years after the date of the death. The trial court agreed with Respondent that the special statute of limitations set forth in §41-5-13 N.M.S.A. 1978 of the Medical Malpractice Act applied to Petitioner, and dismissed her Complaint on January 5, 1981.

Petitioner filed her Notice of Appeal on January 9, 1981, alleging among other matters that the statute of limitations contained in the New Mexico Medical Malpractice Act, which gives a personal representative of someone who has died as a result of medical malpractice less time to file her suit of

wrongful death than it gives to a personal representative of someone who has died from other negligence, violates the Equal Protection and Due Process clauses of the United States Constitution.

After briefs and oral argument, the New Mexico Court of Appeals affirmed the trial court's dismissal of Petitioner's complaint, holding in its opinion of September 8, 1981 that the Medical Malpractice Act does not violate the Equal Protection and Due Process clauses of the United States Constitution. After Petitioner's Motion for Rehearing in the Court of Appeals was denied, Petitioner filed a Petition for Writ of Certiorari with the New Mexico Supreme Court on October 15, 1981. Although that Court initially issued the Writ on October 22, 1981, it later dismissed it as having been improvidently granted on June 15, 1982, on its own motion.

REASONS FOR GRANTING THE WRIT

The 14th Amendment of the United States Constitution prohibits a state from denying the equal protection of the laws to any person within its jurisdiction. In 1976, the New Mexico Legislature enacted the New Mexico Medical Malpractice Act (Sections 41-5-1-28 N.M.S.A. 1978) in response to a perceived crisis in the health care industry; malpractice insurance premiums were rising, and the legislature feared an exodus of health care providers from the State. A copy of the Act appears in the Appendix.

Whether this crisis ever existed in 1976 is open to serious doubt. For example, in **Arneson v. Olson**, 276 N.W. 2d 125 (N.D. 1978), at 136, the Supreme Court of North Dakota emphasized, in holding North Dakota's Act unconstitutional, that malpractice insurance rates are calculated on a national basis and do not take into account the experience of small states thereby making premiums unjustifiably high. New Mexico like North Dakota is also a small state. It may very well be that New Mexico's legislature could have solved the supposed "malpractice crisis" by requiring insurers to calculate rates on a state rather than national basis. Instead, the legislature enacted ill-conceived panic legislation aimed at lowering malpractice insurance premiums by procedurally thwarting the valid claims of victims of medical malpractice. No attempt was made to reduce this incidence of malpractice

by improving the quality of health-care providers within the State.

The stated purpose of the New Mexico Medical Malpractice Act is "[T]o promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico, §41-5-2 N.M.S.A. 1978. Under the definition section of the Act, (§41-5-3 N.M.S.A. 1978), the Act encompasses all malpractice claims against health care providers, whether based on tort or contract, including claims for battery and wrongful death.

Section 41-5-4 of the Act (§41-5-4 N.M.S.A. 1978) prohibits a dollar demand in a Plaintiff's complaint. The prayer "shall be for such damages as are reasonable."

Section 41-5-5 N.M.S.A. is a crucial section of the Act, setting forth the requirements which must be met for a health care provider to qualify under the Act. A health care provider who does not so qualify is not entitled to the benefits of any of the provisions of the Act.

Section 41-5-6 N.M.S.A. places a maximum limitation of $500,000.00 in damages for any one occurrence unless accrued medical expenses exceed that amount. This limitation applies only to a jury award, (§41-5-6[B] N.M.S.A. 1978), while a judge is allowed to award any amount of damages without limitation. Section 41-5-6(c) of the Act prohibits any monetary damage award for future medical expenses, and Subsection D of Section 41-5-6 limits the personal liability of any health care provider to $100,000.00 with any excess amounts to be paid by a patient's compensation fund.

A special statute of limitations is found in Section 41-5-13 N.M.S.A. 1978. It provides that all malpractice claims must be filed within three years after the date that the alleged malpractice occurred. Except for persons under the age of six, who have until the age of 9 to sue, the subsection "applies to all persons regardless of minority or other legal disability." §41-5-13 N.M.S.A. 1978.

Sections 41-5-14-19 set up a Medical Review Commission which is a panel composed of members of the State Bar and health care providers licensed in New Mexico. The panel hears and reviews all medical malpractice cases involving health care

providers who qualify under the Act. No victim of malpractice can file suit directly in State District Court, Section 41-5-16 N.M.S.A., 1978, but must first obtain a decision by the Commission. However, the decision of the Commissional is not binding, (§41-5-20(F) N.M.S.A. 1978), and is not admissible in evidence at any subsequent trial, (§41-5-20(D) N.M.S.A. 1978).

In return for the delay and expense incurred by a malpractice victim in having to go to a panel hearing Section 41-5-23 N.M.S.A. provides that, where the panel decides favorably for the victim, the panel and everyone involved will "cooperate fully with the patient in retaining a physician qualified in the field of medicine involved, who will consult with, assist in trial preparation and testify on behalf of the patient." This section does not require the Commission to provide a malpractice victim with an expert. Nor does it empower the Commission to compel a qualified expert to testify on behalf of a victim. All it does is promise to try to help the victim find any expert, something the victim was probably capable of doing anyway.

Section 41-5-25 N.M.S.A. 1978 sets up a Patient Compensation Fund, whereby each health care provider pays its insurer a surcharge in addition to its normal liability insurance premiums of up to one-third. This surcharge is turned over to the fund superintendent for management and investment, to be used to pay malpractice awards against fund members which exceed $100,000.00

This, then, is the basic statutory scheme embodied in the New Mexico Medical Malpractice Act of 1976. The scheme's basic idea is to protect its members from the full effects of their own malpractice by reducing the rights of their victims to recover for their injuries. It singles out victims of malpracticing health care providers who qualify under the Act, and limits the rights of such victims as compared to the rights of all other tort victims. As such, the Act violates the Equal Protection and Due Process clauses of the United States Constitution.

The right to recover damages for personal injury is not a fundamental right, **Brown v. Merlo**, 106 Cal. Rptr. 388, 506 P.2d 212 (1973), and there is no suspect classification based on race, alienage, or nationality in this case. Nevertheless, this

right to recover damages for personal injuries is a very important one, and the Supreme Court of New Hampshire has stated that the right is "sufficiently important to require that the restrictions imposed on those rights be subjected to more vigorous judicial scrutiny than allowed under the rational basis test," **Carson v. Maurer**, 424 A.2d 825 (N.H. 1980). Another state court has followed the rational relationship test, **"American Bank and Trust Co., v. Community Hospital of Los Gatos,"** 163 Cal. Rptr. 513, 104 Cal. App. 3d 219 (1980), at 517. Yet regardless of which level of scrutiny is applied to this important right in this case, the New Mexico Medical Malpractice Act does not pass Constitutional muster. The provisions and classifications of the Act are arbitrary and unreasonable. They do not rest upon a ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated are treated alike, **Reed v. Reed**, 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed. 2d. 225 (1971).

Section 41-5-13 N.M.S.A. 1978 is a special statute of limitations embodied in the Medical Malpractice Act. All actions for medical malpractice must be brought within three years after the date on which the malpractice occurred. Petitioner's complaint was dismissed for failure to comply with this section of the act, since the action was not filed within three years. However, if this special statute applicable only to medical malpractice claims did not exist, Petitioner's suit would have been governed by the New Mexico Wrongful Death Act, Sections 41-2-1-4 N.M.S.A. 1978, and Petitioner's suit would have been timely filed. §41-2-2 N.M.S.A. 1978 allows suits within three years after the wrongful death; here, Annette died on September 13, 1977 and suit was filed on August 5, 1980.

Section 41-5-13 therefore classifies victims of medical torts differently than victims of all other torts, and the estates of persons killed through medical negligence are accorded fewer rights than those of persons killed by non-medical torts. This classification does nothing to promote the health and welfare of the people of New Mexico, which under Section 41-5-2 N.M.S.A. is the purported purpose of the Act. Instead, this discriminatory statute of limitations serves only to insulate health care providers from valid and legitimate malpractice

claims, while doing nothing to reduce the incidence of malpractice itself.

In addition, the statute is not even substantially related to the reduction of medical insurance premiums, since by the terms of Section 41-5-5(B) N.M.S.A. 1978, the provisions of the Act apply only to health care providers who qualify under Subsection (A) of Section 41-5-5 N.M.S.A. 1978. Therefore, the right to sue a health care provider for death caused by malpractice depends arbitrarily on whether the health care provider has qualified for the benefits of the Act. If it has, then suit must be brought within the limits of Section 41-5-13 N.M.S.A. 1978; but if the health care provider has not qualified, then the Plaintiff may sue until 3 years after the death. The Act therefore is only partly related to the goal of reducing malpractice insurance premiums since nothing in the Act requires a health care provider to become qualified under Section 41-5-5 N.M.S.A. 1978, and the way in which the Act does in part further the statutory purpose by protecting qualified health care providers is arbitrary, unreasonable, and grossly unjust. It serves only to insulate a select group of negligent health care providers from liability by depriving the victim's estate of its right to sue. By enacting this statute, the New Mexico Legislature, encouraged by the medical and insurance lobbies has sought to "escape its responsibility to provide justice by simply eliminating the rights of its citizens" **Carson v. Maurer**, 424 A.2d 825, at 838 (N.H. 1980).

Section 41-5-13 N.M.S.A. 1978 also provides (except for children under six who have until their ninth birthday), that its three year limitation "applies to all persons regardless of minority or other legal disability." The general rule in New Mexico is that statutes of limitation are tolled by minority or other legal disability under Section 37-1-10 N.M.S.A. 1978, which provides that minors and incapacitated persons shall have one year to bring an action (including a personal injury action) after the disability has been removed.

Therefore, under the Medical Malpractice Act, children and incompetent victims who are victims of medical malpractice by "qualified" health care providers are accorded different and inferior rights than those given to all other children and incompetents in New Mexico. This classification is not substantially related to furthering the statutory purpose of

promoting the health and welfare of the citizens of New Mexico. It is simply another means by which the insurance industry has sought to insulate itself from the payment of valid claims. The New Hampshire statute declared unconstitutional in **Carson v. Maurer, supra,** had an almost identical provision. The Court there held that statute to violate the Equal Protection clause since only a relatively small number of malpractice claims are brought by such persons, and therefore such a provision does not substantially further the cost-containment purposes of the statute. New Mexico's statute violates Equal Protection for the same reason.

Under Section 41-5-13 N.M.S.A. 1978, a child who is under the age of six when injured by malpractice has until his ninth birthday to file suit. Therefore, a child injured at the age of one year has eight years in which to sue, while a child injured at the age of six has only three years to sue. Unless it can be argued that there is a dramatic increase in malpractice claims on behalf of children under six years and older, (which is patently absurd), then the conclusion that this classification is arbitrary and devoid of any relationship whatsoever to the statutory purpose is inescapable.

Section 41-5-6 N.M.S.A. 1978 limits recovery from malpractice to $500,000.00 unless accrued medical expenses exceed that amount. Several other state courts have found such limits on recovery to violate Equal Protection on the grounds that such a limit is arbitrary and unreasonable. See, e.g. **Simon v. St. Elizabeth Medical Center,** 355 N.E. 2d. 903 at 910 (Ohio Ct. Common Pleas 1976), which had a $200,000.00 limit, **Wright v. Central Du Page Hospital Association,** 347 N.E. 2d. 736 at 742 (Ill. 1976), ($500,000.00 limit), and **Arneson v. Olson, supra,** at 136 ($500,000.00 limit).

New Mexico's $500,000.00 damage limitation is also arbitrary and unreasonable. It destroys the right of those most seriously harmed by denying them adequate compensation, even through the number of victims with such claims must be only a small percentage of malpractice victims. Rights are arbitrarily destroyed, even though the destruction thereof is only slightly related, if at all, to the cost-containment purpose of the Act. No other New Mexico statute limits damages; victims of medical malpractice are singled out for dis-

criminatory treatment by the Act.

In addition to the discriminatory nature of this statute, it is totally unnecessary. As pointed out by the Court in **Carson, supra,** at 837, if there is an excessive verdict, remittitur is always available. The same is true in New Mexico.

The argument is often made that this limitation is justified because it reduces the cost of medical care to all members of society. This is the so called "quid pro quo" argument which was rejected in **Simon, supra,** at 910, where the Court reasoned that there is no quid pro quo where some give up their right to damages so that all may have cheaper medical care, because the seriously injured give us so much and gain nothing. The same is true in New Mexico, where this limitation seeks to disproportionately heap the responsibility for keeping medical costs down onto the backs of those who have been most grievously injured.

It should also be noted that this limitation imposed by Section 41-5-6 N.M.S.A. 1978 applies only to jury verdicts. A judge can grant damages without limitation. This classification is blatantly arbitrary and does nothing to substantially further the cost-containment goals of the Act. Instead, it simply reflects a mistrust of juries on the part of the insurance industry which ignores the existence of remittitur procedures. Under the Act, a victim's right to full compensation depends on the arbitrary circumstances of whether the case is tried to a judge or a jury.

The New Mexico Medical Malpractice Act is a classic example of special legislation drafted in panic to protect a particular group. The rights of victims of medical malpractice by "qualified" health care providers are less than those of all other tort victims. Even among victims of "qualified" health care providers, rights vary depending on arbitrary factors such as age of the victim, how badly the victim is injured, and whether the case is tried before a judge or a jury. This Act ignores the very existence of the Equal Protection clause and must not be allowed to stand.

CONCLUSION

For all of the reasons stated above, a Writ of Certiorari should issue to review the judgment and opinion of the New Mexico Court of Appeals.

RESPECTFULLY SUBMITTED,
ALFRED M. CARVAJAL, P.A.

By Alfred M. Carvajal

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the New Mexico Court of Appeals, was mailed to counsel for Respondent this 14th day of September, 1982.

Alfred M. Carvajal
ALFRED M. CARVAJAL

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

EMMA S. ARMIJO, Personal Represenative for the Estate of Annette Armijo, Deceased,

Plaintiff-Appellant,

v.

MATTHEW A. TANDYSH,

Defendant-Appellee.
No. 5036

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY TRAUB, Judge

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OPINION

WOOD, Judge.

Plaintiff, as personal representative of Annette Armijo's Estate, sought damages claiming that defendant's malpractice resulted in Annette's wrongful death. The trial court dismissed the complaint with prejudice. Plaintiff appeals. We consider two issues: (1) the applicable statute of limitations; and (2) whether the applicable statute of limitations violates either equal protection or due process.

Applicable Statute of Limitations

The complaint alleged the malpractice occurred on May 20-21, 1977, and that Annettee died on September 13, 1977. The complaint was filed August 15, 1980.

Section 41-2-2, N.M.S.A. 1978, provides that a wrongful death claim "must be brought within three years after the cause of action accrues. The cause of action accrues as of the date of death." If the limitation period for a wrongful death claim applies, the complaint was not barred.

The pertinent limitation period for malpractice claims against a health care provider is "three years after the date that the act of malpractice occurred." Section 41-5-13, N.M.S.A. 1978. If this limitation period applies, the complaint was barred.

Annotation, 80 A.L.R.2d 320 at 353 (1961), states:

> Where malpractice results in the death of a patient, the period of limitatoin provided in a wrongful death statute, and not the one provided for or applicable to malpractice actions, has been held controlling in an action brought for the patient's death.

This view is not applicable in New Mexico because of specific provisions in the Medical Malpractice Act.

Section 41-5-3(C), N.M.S.A. 1978, defines a malpractice claim as including "any cause of action arising in this state against a health care provider . . . whether the patient's claim or cause of action sounds in tort or contract, and includes but is not limited to actions based on battery or wrongful death."

The specific inclusion of a wrongful death claim within the definition of a malpractice claim makes the limitation period of § 41-5-13, supra, applicable to plaintiff's claim. The reason is that this specific inclusion controls over the general

limitation period for a wrongful death claim. Hopper v. Board of County Commissioners, 84 N.M. 604, 506 P.2d 348 (Ct.App. 1973).

Equal Protection and Due Process

(a) The Legislature had a rational basis for providing, in § 41-5-13, supra, a specific limitation period for malpractice claims against health care providers. See § 41-5-2, N.M.S.A. 1978; McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975). This limitation period is not a classification that violates the constitutional equal protection requirement. The result is that there is no equal protection violation because a wrongful death claim based on malpractice has a limitation period different from a wrongful death claim which does not involve malpractice.

(b) Section 41-5-13, supra, does not provide for two classes of defendant health care providers; there is nothing in § 41-5-13, supra, that distinguishes between health care providers. Seeking to find such a distinction, plaintiff contends that § 41-5-13, supra, applies only to "qualified" health care providers. Section 41-5-5, N.M.S.A. 1978, in Paragraph A, does provide for qualifying. Paragraph 8 states: "Health care providers not qualifying hereunder shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of malpractice claims against them." Plaintiff's view is that because of § 41-5-5(B), supra, the limitation period of § 41-5-13, supra, does not apply to non-qualified health care providers, and the distinction between qualified and non-qualified health care providers, for limitation of action purposes, violates equal protection.

At the time of enactment of the Medical Malpractice Act by Laws 1976, ch. 2, a malpractice claim accrued at the time of the wrongful act causing injury, and the limitation period began to run at that time. Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963). Thus, apart from the provision for a minor stated in § 41-5-13, supra, the enactment of the Medical Malpractice Act made no change in the applicable limitation period. Peralta v. Martinez, 90 N.M. 391, 564 P.2d 194 (Ct.App. 1977), did make a change in the limitation period for pre-Medical Malpractice Act cases; the Medical Malpractice Act was not involved in **Peralta.**

Inasmuch as the legislative intent was to continue the

limitation period stated in Roybal v. White, supra, the statutory limitation period cannot be considered to come within the meaning of "benefit" as used in § 41-5-5(B), supra. The result is that § 41-5-13, supra, applies to all malpractice claims, as defined in § 41-5-3(C), supra.

There being no distinction, for limitation of action purposes, between qualified and non-qualified health care providers, there is no basis for this equal protection argument.

(c) Inasmuch as § 41-5-13, supra, makes no distinction as to malpractice claims, there is no distinction between malpractice claim plaintiffs, i.e., those who claim against qualified providers as opposed to those claiming against providers who have not qualified, on which to base an equal protection argument.

(d) Under § 41-5-13, supra, the "death" portion of a wrongful death claim, see Stang v. Hertz Corporation, 81 N.M. 348, 467 P.2d 14 (1970), could be barred by the limitation period before death occurred. This factual situation has arisen in the past, see Natseway v. Jojola, 56 N.M. 793, 251 P.2d 274 (1952). Any change to be made is a matter for the Legislature. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct.App. 1977). This factual situation violates neither equal protection nor due process. Anderson v. Wagner, 79 Ill. 2d 295, 402 N.E. 2d 560 (1979). See Sellers v. Edwards, 265 So. 2d 438 (Ala. 1972); Landgraff v. Wagner, 26 Ariz. App. 49, 5464 P. 2d 26 (1976); Dunn v. Felt, 379 A. 2d 1140 (Del. Super. 1977); compares Espanola Housing Authority v. Atencio, 90 N.M. 787, 568 P. 2d 1233 (1977); Davis v. Savage, 50 N.M. 30, 168 P. 2d 851 (1946); Mora-San Miguel Elec. Coop. v. Hick & Ragland, Etc., 93 N.M. 175, 598 P. 2d 218 (Ct. App. 1979); Dairyland Ins. Co., Inc. v. Board of County Com'rs, 88 N.M. 180, 538 P. 2d 1202 (Ct. App. 1975).

The order of dismissal is affirmed. Plaintiff is to bear her appellate costs.

IT IS SO ORDERED.

/s/ JOE WOOD

Judge

WE CONCUR:

/s/B.C. HERNANDEZ, C.J.

/s/ MARY C. WALTERS J.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Tuesday, June 15, 1982

NO. 13,913

EMMA S. ARMIJO, Personal
Representative of the
Estate of Annette Armijo,
Deceased,

Petitioner,

vs. Original Proceeding on Certiorari

MATTHEW A. TANDYSH,

Respondents.

This cause having heretofore been submitted and taken under advisement, and a writ of certiorari having issued from this Court on the 22nd day of October, 1981;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari heretofore issued in this cause on October 22, 1981, be and the same is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 5036 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

/s/ ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

41-4-29. Governmental entities; health care students liability coverage; authority to purchase.

A. Governmental entities may purchase public liability fund coverage, if offered, for health care liability of health care students currently enrolled in health care instructional programs provided by or through the governmental entity.

B. The risk management division of the department of finance and administration may provide public liability fund coverage for health care liability of health care students currently enrolled in health care instructional programs provided by or through a governmental entity. Such coverage shall be limited to health care liability risks arising out of assigned health care instructional activities.

C. This section shall not be construed as waiving or otherwise affecting any governmental entity's sovereign immunity or any other limitations or protections under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] or any other law. This section shall not be construed as creating any right of action against any governmental entity or any of its officers, employees or servants for any activities insured pursuant to this section.

History: Laws 1981, ch. 269, § 1.

Effective dates. — Laws 1981, ch. 269, contains no effective date provision, but was enacted at the session which adjourned on March 21, 1981. See N.M. Const. art. IV, § 23.

APPENDIX C,

ARTICLE 5

Medical Malpractice Act

Sec.
41-5-1. Short title.
41-5-2. Purpose of act.
41-5-3. Definitions.
41-5-4. Ad damnum clause.
41-5-5. Qualifications.
41-5-6. Limitation of recovery.
41-5-7. Future medical expenses.
41-5-8. Medical benefits prior to judgment.
41-5-9. District court; continuing jurisdiction.
41-5-10. Patient; future examinations and hearings.
41-5-11. Set-off of advance payments.
41-5-12. Claims for compensation not assignable.
41-5-13. Limitations.
41-5-14. Medical review commission.
41-5-15. Commission decision required; application.
41-5-16. Application procedure.
41-5-17. Panel selection.
41-5-18. Time and place of hearing.
41-5-19. Hearing procedures.
41-5-20. Panel deliberations and decision.
41-5-21. Director; rules of procedure.
41-5-22. Tolling of statute of limitation.
41-5-23. Provision of expert witness.
41-5-24. Maintenance of records.
41-5-25. Patient's compensation fund.
41-5-26. Malpractice coverage.
41-5-27. Report by district court clerks.
41-5-28. Payment of medical review commission expenses.

41-5-1. Short title.

This act [41-5-1 to 41-5-28 NMSA 1978] may be cited as the "Medical Malpractice Act."

History: 1953 Comp., § 58-33-1, enacted by Laws 1976, ch. 8, § 1.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 105 to 223.

Malpractice in connection with electroshock treatment, 94 A.L.R.3d 317.

Measure and elements of damages in action against physician for breach of contract to achieve particular result or cure, 99 A.L.R.3d 303.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 A.L.R.4th 775.

Propriety of hospital's conditioning physician's staff privileges on his carrying professional liability or malpractice insurance, 7 A.L.R.4th 1238.

Medical malpractice, administering or prescribing birth control pills or devices, 9 A.L.R.4th 373.

Propriety, in medical malpractice case, of admitting testimony regarding physician's usual custom or habit in order to establish nonliability, 10 A.L.R.4th 1243.

Duty of medical practitioner to warn patient of subsequently discovered danger from treatment previously given, 12 A.L.R.4th 41.

Hospital's liability for negligence in failing to review or supervise treatment given by doctor, or to require consultation, 12 A.L.R.4th 87.

41-5-2. Purpose of act.

The purpose of the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978] is to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico.

History: 1953 Comp., § 58-33-2, enacted by Laws 1976, ch. 2, § 2.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 225 to 238.

41-5-3. Definitions.

As used in the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978]:

A. "health care provider" means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant;

B. "insurer" means an insurance company engaged in writing health care provider malpractice liability insurance in this state;

C. "malpractice claim" includes any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient, whether the patient's claim or cause of action sounds in tort or contract, and includes but is not limited to actions based on battery or wrongful death; "malpractice claim" does not include a cause of action arising out of the driving, flying or nonmedical acts involved in the operation, use or maintenance of a vehicular or aircraft ambulance;

D. "medical care and related benefits" means all reasonable medical, surgical, physical rehabilitation and custodial services and includes drugs, prosthetic devices and other similar materials reasonably necessary in the provision of such services;

E. "patient" means a natural person who received or should have received health care from a licensed health care provider, under a contract, express or implied; and

F. "superintendent" means the superintendent of insurance of this state.

History: 1953 Comp., § 58-33-3, enacted by Laws 1976, ch. 2, § 3; 1977, ch. 284, § 1.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 77 Am. Jur. 2d Venue § 16.

Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment, 8 A.L.R.3d 639.

Liability of operating surgeon for negligence of nurse assisting him, 12 A.L.R.3d 1017.

Liability for injuries or death as a result of physical therapy, 53 A.L.R.3d 1250.

Chiropractor's liability for failure to refer patient to medical practitioner, 58 A.L.R.3d 580.

Liability of anesthetist for injuries from spinal anesthetics, 90 A.L.R.3d 775.

70 C.J.S. Physicians and Surgeons § 40.

41-5-4. Ad damnum clause.

A patient or his representative having a malpractice claim for bodily injury or death may file a complaint in any court of law having requisite jurisdiction and demand right of trial by jury. No dollar amount or figure shall be included in the demand in any complaint asserting a malpractice claim and filed after the effective date of this section, but the request shall be for such damages as are reasonable. This section shall not prevent a patient or his representative from alleging a requisite jurisdictional amount in a malpractice claim filed in a court requiring such an allegation.

History: 1953 Comp., § 58-33-4, enacted by Laws 1976, ch. 2, § 4; 1977, ch. 284, § 2.

Cross-references. — As to jurisdictional amount in magistrate court, see 35-3-7 NMSA 1978. For commencement of action in district court, see Rule 3, N.M. R. Civ. P. For commencement of action by complaint in magistrate court, see Rule 2, N.M. R. Civ. P. (Magis. Cts.).

Emergency clauses. — Laws 1977, ch. 284, § 5, makes the act effective immediately. Approved April 7, 1977.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-5. Qualifications.

A. To be qualified under the provisions of the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978], a health care provider shall:

(1) establish its financial responsibility by filing proof with the superintendent that the health care provider is insured by a policy of malpractice liability insurance in the amount of at least one hundred thousand dollars ($100,000) per occurrence, or by having continuously on deposit the sum of one hundred thousand dollars ($100,000) in cash with the superintendent or such other like deposit as the superintendent may allow by rule or regulation; and

(2) pay the surcharge assessed on health care providers by the superintendent pursuant to Section 25 [41-5-25 NMSA 1978] of the Medical Malpractice Act.

B. Health care providers not qualifying hereunder shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of malpractice claims against them.

History: 1953 Comp., § 58-33-5, enacted by Laws 1976, ch. 2, § 5.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-6. Limitation of recovery.

A. Except for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice may not exceed five hundred thousand dollars ($500,000) per occurrence. In jury cases the jury shall not be given any instructions dealing with this limitation.

B. If a jury returns a malpractice award in excess of five hundred thousand dollars ($500,000), the jury shall be given a special interrogatory asking the value of the accrued medical care and related benefits included in the jury's award. This special interrogatory shall not inquire into the value of future medical care and related benefits. If the value of the accrued medical care and related benefits equals or exceeds the amount by which the jury award exceeds five hundred thousand dollars ($500,000), the court shall enter judgment in the amount of the jury award. If the value given by the jury in response to this special interrogatory is less than the amount by which the jury award exceeds five hundred thousand dollars ($500,000), then the trial court shall reduce the jury award by the difference between the two figures. If the malpractice claim is tried without a jury, the value of the accrued medical care and related benefits shall not be subject to the five hundred thousand dollar ($500,000) limitation.

C. Monetary damages shall not be awarded for future medical expenses in malpractice claims.

D. A health care provider's personal liability is limited to one hundred thousand dollars ($100,000) for monetary damages and medical care and related benefits as provided in Section 7 [41-5-7 NMSA 1978]. Any amount due from a judgment or settlement in excess of one hundred thousand dollars ($100,000) shall be paid from the patient's compensation fund, as provided in Section 25 [41-5-25 NMSA 1978] of the Medical Malpractice Act.

History: 1953 Comp., § 58-33-6, enacted by Laws 1976, ch. 2, § 6.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages §§ 113, 114; 61 Am. Jur. 2d Physicians and Surgeons §§ 215 to 218.

Contributory negligence or assumption of risk, 89 A.L.R.2d 1043.

Aggravation of injuries as mitigating damages in action against physician or surgeon for malpractice, 90 A.L.R.2d 1046.

Liability of chiropodist, 98 A.L.R.2d 1278.

Allowance of punitive damages in medical malpractice action, 27 A.L.R.3d 1274.

Validity and construction of state statutory provisions relating to limitations on amount of recovery in medical malpractice claim and submission of such claim to pretrial panel, 80 A.L.R.3d 583.

Recovery, and measure and element of damages, in action against dentist for breach of contract to achieve particular result or cure, 11 A.L.R.4th 748.

Validity of statute establishing contingent fee scale for attorneys representing parties in medical malpractice actions, 12 A.L.R.4th 23.

70 C.J.S. Physicians and Surgeons §§ 64, 67, 68.

41-5-7. Future medical expenses.

A. In all malpractice claims where liability is established, the jury shall be given a special interrogatory asking if the patient is in need of future medical care and related benefits. No inquiry shall be made concerning the value of such future medical care and related benefits, and evidence relating to the same shall not be admissible. In actions upon malpractice claims tried to the court, where liability is found, the court's findings shall include a recitation that the patient is or is not in need of future medical care and related benefits.

B. Except as provided in Section 10 [41-5-10 NMSA 1978], once a judgment is entered in favor of a patient who is found to be in need of future medical care and related benefits, or a settlement is reached between a patient and health care provider in which the provision of medical care and related benefits is agreed upon, and continuing as long as medical or surgical attention is reasonably necessary, the patient shall be furnished with all medical care and related benefits, directly or indirectly made necessary by the health care provider's malpractice, subject to a semiprivate room limitation in the event of hospitalization, unless the patient refuses to allow them to be so furnished.

C. Awards of such medical care and related benefits shall not be subject to the five hundred thousand dollar ($500,000) limitation imposed in Section 6 [41-5-6 NMSA 1978].

D. Payments for medical care and related benefits shall be made as expenses are incurred.

E. The health care provider shall be liable for all medical care and related benefits payments until the total payments made by or on behalf of it for monetary damages and medical care and related benefits combined equals one hundred thousand dollars ($100,000), after which the payments shall be made by the patient's compensation fund.

F. This section shall not be construed to prevent a patient and a health care provider from entering into a settlement agreement whereby medical care and related benefits shall be provided for a limited period of time only or to a limited degree.

G. The court in a supplemental proceeding shall estimate the value of the future medical care and related benefits reasonably due the patient on the basis of evidence presented to it. That figure shall not be included in any award or judgment but shall be included in the record as a separate court finding.

H. A judgment of punitive damages against a health care provider shall be the personal liability of the health care provider. Punitive damages shall not be paid from the patient's compensation fund nor from the proceeds of the health care provider's insurance contract unless the contract expressly provides coverage. Nothing in Section 6 [41-5-6 NMSA 1978] shall preclude the award of punitive damages to a patient. Nothing in this subsection shall be construed to authorize the imposition of liability for punitive damages on a derivative basis where that imposition would not be otherwise authorized by law.

History: 1953 Comp., § 58-33-7, enacted by Laws 1976, ch. 2, § 7.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-8. Medical benefits prior to judgment.

A health care provider named as a defendant in a malpractice claim, or named as a respondent in a proceeding before the medical review commission created in the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978], shall have the option of paying for the patient's medical care and related benefits at any time prior to the entry of a judgment. Except as provided in Section 11 [41-5-11 NMSA 1978] of the Medical Malpractice Act,

evidence of a health care provider's payment for such benefits shall not be admissible in the trial of the malpractice claim brought against it.

History: 1953 Comp., § 58-33-8, enacted by Laws 1976, ch. 2, § 8.

41-5-9. District court; continuing jurisdiction.

A. The district court from which final judgment issues shall have continuing jurisdiction in cases where medical care and related benefits are awarded pursuant to Section 7 [41-5-7 NMSA 1978].

B. In all cases where the patient's continued need of such benefits, or the degree to which such benefits are needed is challenged at a point in time after a judgment is entered, the court, sitting without a jury, shall determine whether such need continues to exist and the extent of such need.

C. Whenever a patient petitions the district court for an increase in medical care and related benefits, the petition shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character and motions for preliminary injunctions filed pursuant to Rules 65, 66, NMR Civ. P.

D. The health care provider shall have the burden of proving that the patient's need for benefits has subsided or abated, or that medical care and related benefits are not reasonably necessary, which it shall establish by clear and convincing evidence. The patient shall have the burden of proving that his need for medical care and related benefits has increased, which he shall establish by a preponderance of the evidence.

History: 1953 Comp., § 58-33-9, enacted by Laws 1976, ch. 2, § 9.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-10. Patient; future examinations and hearings.

A. Any health care provider shall be entitled to have a physical examination of the patient by a physician of the health care provider's choice from time to time for the purpose of determining the patient's continued need of medical care and related benefits, subject to the following requirements:

(1) notice in writing shall be delivered to or served upon the patient specifying the time and place where it is intended to conduct the examination. Such notice must be given at least ten days prior to the time stated in the notice. Delivery by certified mail is permitted;

(2) such examination shall be by a physician qualified to practice medicine under the law of this state or of the state or county wherein the patient resides;

(3) the place at which such examination is to be conducted shall not involve an unreasonable amount of travel for the patient considering all the circumstances. It shall not be necessary for a patient who resides outside this state to come into this state for such an examination unless so ordered by the court;

(4) within thirty days after the examination, the patient shall be compensated by the party requesting the examination for all necessary and reasonable expenses incidental to submitting to the examination including the reasonable cost of travel, meals, lodging, loss of pay or other like direct expense;

(5) examinations may not be required more frequently than at six-month intervals; except that upon application to the court having jurisdiction of the claim and after reasonable cause shown therefor, examination within a shorter interval may be ordered. In considering such application, the court should exercise care to prevent harassment to the patient;

(6) the patient shall be entitled to have a physician or an attorney of his own choice or both present at such examination. The patient shall pay such physician or attorney himself; and

(7) the patient shall be promptly furnished with a copy of the report of the physical examination made by the physician making the examination on behalf of the health care provider.

B. If a patient fails or refuses to submit to examination in accordance with the notice and if the requirements of Subsection A of this section have been satisfied, the court may forfeit all medical care and related benefits which would accrue or become due to him except for such failure or refusal to submit to examination during the period that he willfully persists in such failure or refusal.

C. If any patient shall persist in any injurious practice which imperils, retards or impairs his recovery or increases his injury or refuses to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the court may in its discretion reduce or suspend his medical care and related benefits until the injurious practice is discontinued.

D. Any physician selected by the health care provider and paid by the health care provider who shall make or be present at an examination of the patient conducted in pursuance of this section may be required to testify as to the conduct thereof and the findings made. Communications made by the patient upon such examination to such physician or physicians shall not be considered privileged.

E. The health care provider or the custodian of the patient's compensation fund shall pay all reasonable legal fees, cost of medical examinations and the cost of the fees of medical expert witnesses in any proceeding in which the patient succeeds in raising his medical care and related benefits or in any unsuccessful proceeding brought by the health care provider or the patient's compensation fund custodian to reduce medical care and related benefits.

History: 1953 Comp., § 58-33-10, enacted by Laws 1976, ch. 2, § 10.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-11. Set-off of advance payments.

A. Evidence of an advance payment is not admissible until there is a final judgment in favor of the patient, in which event the court shall reduce the judgment to the patient to the extent of the advance payment. In jury cases where there is a factual dispute concerning an alleged advance payment, all questions of fact relating to such an advance payment shall be resolved by the jury after it has reached its verdict. The advance payment shall inure to the exclusive benefit of the health care provider or a party making the payment in its behalf. In the event the advance payment exceeds the liability of the defendant or the insurer making it, the court shall order any adjustment necessary to equitably apportion the amount which each defendant is obligated to pay, exclusive of costs. In no case shall an advance payment in excess of an award be repayable by the person receiving it.

B. If a health care provider should elect to pay for medical care and related benefits at any time prior to the entry of a judgment, as provided in Section 8 [41-5-8 NMSA 1978] of the Medical Malpractice Act, and subsequently is found not to be liable, its legal and equitable right of recovery for all such payments shall not be foreclosed or prejudiced in any way.

History: 1953 Comp., § 58-33-11, enacted by Laws 1976, ch. 2, § 11.

41-5-12. Claims for compensation not assignable.

A patient's claim for compensation under the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978] is not assignable.

History: 1953 Comp., § 58-33-12, enacted by Laws 1976, ch. 2, § 12.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 170 to 174.

41-5-13. Limitations.

No claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred except that a minor under the full age of six years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability.

History: 1953 Comp., § 58-33-13, enacted by Laws 1976, ch. 2, § 13.

Emergency clauses. — Laws 1976, ch. 2, § 32, makes the act effective immediately. Approved February 27, 1976.

When cause of action commences. — A cause of action for personal injuries for malpractice accrues at the time of the wrongful act causing the injury, and the mere fact that plaintiff was not aware of the existence or extent of his injuries or his right of action for malpractice does not postpone the commencement of the statute of limitations. Raybal v. White, 72 N.M. 285, 383 P.2d 250 (1963).

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Limitation of actions, 80 A.L.R.2d 320.

Applicability, to negligence action against hospital, of statute of limitations applicable to malpractice and related actions against physicians, surgeons, or the like, 89 A.L.R.2d 1180.

Applicability, in action against nurse in her professional capacity, of statute of limitations applicable to malpractice, 8 A.L.R.3d 1336.

When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body, 70 A.L.R.3d 7.

Amendment purporting to change the nature of the action or theory of recovery made after statute of limitations has run, as relating back to filing of original complaint, 70 A.L.R.3d 82.

Statute of limitations relating to medical malpractice actions as applicable to actions against unlicensed practitioner, 70 A.L.R.3d 114.

When statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedures, 93 A.L.R.3d 218.

When statute of limitations begins to run in dental malpractice suits, 3 A.L.R.4th 318.

What statute of limitations governs physician's action for wrongful denial of hospital privileges, 3 A.L.R.4th 1214.

70 C.J.S. Physicians and Surgeons § 60.

41-5-14. Medical review commission.

A. The New Mexico medical review commission is created. The function of the New Mexico medical review commission is to provide panels to review all malpractice claims against health care providers covered by the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978].

B. Those eligible to sit on a panel shall consist of health care providers licensed pursuant to New Mexico law and residing in New Mexico and the members of the state bar.

C. Cases which a panel will consider include all cases involving any alleged act of malpractice occurring in New Mexico by health care providers qualified under the Medical Malpractice Act.

D. An attorney shall submit a case for the consideration of a panel, prior to filing a complaint in any district court or other court sitting in New Mexico, by addressing an application, in writing, signed by the patient or his attorney, to the director of the medical review commission.

E. The director of the medical review commission will be an attorney appointed by and serving at the pleasure of the chief justice of the New Mexico supreme court.

F. The chief justice shall set the director's salary and report the same to the superintendent in his capacity as custodian of the patient's compensation fund.

History: 1953 Comp., § 58-33-14, enacted by Laws 1976, ch. 2, § 14.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-15. Commission decision required; application.

A. No malpractice action may be filed in any court against a qualifying health care provider before application is made to the medical review commission and its decision is rendered.

B. This application shall contain the following:

(1) a brief statement of the facts of the case, naming the persons involved, the dates and the circumstances, so far as they are known, of the alleged act or acts of malpractice; and

(2) a statement authorizing the panel to obtain access to all medical and hospital records and information pertaining to the matter giving rise to the application, and, for the purposes of its consideration of the matter only, waiving any claim of privilege as to the contents of those records. Nothing in that statement shall in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court.

History: 1953 Comp., § 58-33-15, enacted by Laws 1976, ch. 2, § 15.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-16. Application procedure.

A. Upon receipt of an application for review, the commission's director or his delegate shall cause to be served a true copy of the application on the health care providers involved. Service shall be effected pursuant to New Mexico law. If the health care provider involved chooses to retain legal counsel, his attorney shall informally enter his appearance with the director.

B. The health care provider shall answer the application for review and in addition shall submit a statement authorizing the panel to obtain access to all medical and hospital records and information pertaining to the matter giving rise to the application, and, for the purposes of its consideration of the matter only, waiving any claim of privilege as to the contents of those records. Nothing in that statement shall in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court.

C. In instances where applications are received employing the theory of respondeat superior or some other derivative theory of recovery, the director shall forward such applications to the state professional societies, associations or licensing boards of both the individual health care provider whose alleged malpractice caused the application to be filed, and the health care provider named a respondent as employer, master or principal.

History: 1953 Comp., § 58-33-16, enacted by Laws 1976, ch. 2, § 16.

41-5-17. Panel selection.

A. Applications for review shall be promptly transmitted by the director to the directors of the health care provider's state professional society or association and the state bar association, who shall each select three panelists within thirty days from the date of transmittal of the application.

B. If no state professional society or association exists, or if the health care provider does not belong to such a society or association, the director shall transmit the application to the health care provider's state licensing board, which shall in turn select three persons from the health care provider's profession and, where applicable, to [two] persons specializing in the same field or discipline as the health care provider.

C. In cases where there are multiple defendants, the case against each health care provider may be reviewed by a separate panel, or a single combined panel may review the claim against all parties defendant, at the discretion of the director.

D. Three panel members from the health care provider's profession and three panel members from the state bar association shall sit in review in each case.

E. In those cases where the theory of respondeat superior or some other derivative theory of recovery is employed, two of the panel members shall be chosen from the individual health care provider's profession and one panel member shall be chosen from the profession of the health care provider named a respondent employer, master or principal.

F. The director of the commission or his delegate, who shall be an attorney, shall sit on each panel and serve as chairman.

G. Any member shall disqualify himself from consideration of any case in which, by virtue of his circumstances, he feels his presence on the panel would be inappropriate, considering the purpose of the panel. The director may excuse a proposed panelist from serving.

H. Whenever a party shall make and file an affidavit that a panel member selected pursuant to this section cannot, according to the belief of the party making the affidavit, sit in review of the application with impartiality, that panel member shall proceed no further. Another panel member shall be selected by the health care provider's professional association, state licensing board or the state bar association, as the case may be. A party may not disqualify more than three proposed panel members in this manner in any single malpractice claim.

History: 1953 Comp., § 58-33-17, enacted by Laws 1976, ch. 2, § 17.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 3d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 120 to 150.

41-5-18. Time and place of hearing.

A date, time and place for hearing shall be fixed by the director and prompt notice thereof shall be given to the parties involved, their attorneys and the members of the panel. In no instance shall the date set be more than sixty days after the transmittal by the director of the application for review, unless good cause exists for extending the period. Hearings may be held anywhere in the state of New Mexico, and the director shall give due regard to the convenience of the parties in determining the place of hearing.

History: 1953 Comp., § 58-33-18, enacted by Laws 1976, ch. 2, § 18.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-19. Hearing procedures.

A. At the time set for hearing, the attorney submitting the case for review shall be present and shall make a brief introduction of his case, including a resume of the facts constituting alleged professional malpractice which he is prepared to prove. The health care provider against whom the claim is brought and its attorney may be present and may make an introductory statement of its case.

B. Both parties may call witnesses to testify before the panel, which witnesses shall be sworn. Medical texts, journals, studies and other documentary evidence relied upon by either party may be offered and admitted if relevant. Written statements of fact of treating health care providers may be reviewed. The monetary damages in any case shall not be a subject of inquiry or discussion.

C. The hearing will be informal and no official transcript shall be made. Nothing contained in this paragraph shall preclude the taking of the testimony by the parties at their own expense.

D. At the conclusion of the hearing, the panel may take the case under advisement or it may request that additional facts, records, witnesses or other information be obtained and presented to it at a supplemental hearing, which shall be set for a date and time certain, not longer than thirty days from the date of the original hearing unless the attorney bringing the matter for review shall in writing consent to a longer period.

E. Any supplemental hearing shall be held in the same manner as the original hearing, and the parties concerned and their attorneys may be present.

History: 1953 Comp., § 58-33-19, enacted by Laws 1976, ch. 2, § 19.

Hearings conducted in atmosphere free of judicial intimidations. — Hearings are to be conducted in an atmosphere free of the intimidations that may accompany a court setting, and the give-and-take of the panel's deliberations, after it has heard the presentation of the parties, is to be as open and uninhibited as are a jury's deliberations at the end of a court trial. Salazare v. St. Vincent Hosp., 96 N.M. 409, 631 P.2d 315 (Ct. App.), aff'd in part and rev'd on other grounds, 95 N.M. 147, 619 P.2d 823 (1980).

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-20. Panel deliberations and decision.

A. The deliberations of the panel shall be and remain confidential. Upon consideration of all the relevant material, the panel shall decide only two questions:

(1) whether there is substantial evidence that the acts complained of occurred and that they constitute malpractice; and

(2) whether there is a reasonable medical probability that the patient was injured thereby.

B. All votes of the panel on the two questions for decision shall be by secret ballot. The decision shall be by a majority vote of those voting members of the panel who have sat on the entire case. The decision shall be communicated in writing to the parties and attorneys concerned and a copy thereof shall be retained in the permanent files of the commission.

C. The decision shall in every case be signed for the panel by the chairman, who shall vote only in the event the other members of the panel are evenly divided, and shall contain only the conclusions reached by a majority of its members and the number of members, if any, dissenting therefrom; provided, however, that if the vote is not unanimous, the majority may briefly explain the reasoning and basis for their conclusion, and the dissenters may likewise explain the reasons for disagreement.

D. The report of the medical review panel shall not be admissible as evidence in any action subsequently brought in a court of law. A copy of the report shall be sent to the health care provider's professional licensing board.

E. Panelists and witnesses shall have absolute immunity from civil liability for all communications, findings, opinions and conclusions made in the course and scope of duties prescribed by the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978].

F. The panel's decisions shall be without administrative or judicial authority and shall not be binding on any party. The panel shall make no effort to settle or compromise any claim nor express any opinion on the monetary value of any claim.

History: 1953 Comp., § 58-33-20, enacted by Laws 1976, ch. 2, § 20.

Panel's deliberations to be open and uninhibited. — Hearings are to be conducted in an atmosphere free of the intimidations that may accompany a court setting, and the give-and-take of the panel's deliberations, after it has heard the presentation of the parties, is to be as open and uninhibited as are a jury's deliberations at the end of a court trial. Salazare v. St. Vincent Hosp., 96 N.M. 409, 631 P.2d 315 (Ct. App.), aff'd in part and rev'd on other grounds, 95 N.M. 147, 619 P.2d 823 (1980).

Extent of privilege from discovery. — The privilege exempting panelists of the medical review commission from discovery applies to the panel's deliberations and any report made by the panel, but not to testimony heard by the panel. St. Vincent Hosp. v. Salazare, 95 N.M. 147, 619 P.2d 823 (1980).

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-21. Director; rules of procedure.

The director is authorized to adopt and publish rules of procedure necessary to implement and carry out the duties of the medical review commission. No rule shall be adopted, however, which requires a party to make a monetary payment as a condition to bringing a malpractice claim before the medical review panel.

History: 1953 Comp., § 58-33-21, enacted by Laws 1976, ch. 2, § 21.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 188 to 197, 199 to 207.

41-5-22. Tolling of statute of limitation.

The running of the applicable limitation period in a malpractice claim shall be tolled upon submission of the case for the consideration of the panel and shall not commence to run again until thirty days after the panel's final decision is entered in the permanent files of the commission and a copy is served upon the claimant and his attorney by certified mail.

History: 1953 Comp., § 58-33-22, enacted by Laws 1976, ch. 2, § 22.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — When statute of limitations begins to run in denial malpractice suits, 3 A.L.R.4th 318.

What statute of limitations governs physician's action for wrongful denial of hospital privileges, 3 A.L.R.4th 1214.

41-5-23. Provision of expert witness.

In any malpractice claim where the panel has determined that the acts complained of were or reasonably might constitute malpractice and that the patient was or may have been injured by the act, the panel, its members, the director and the professional association concerned will cooperate fully with the patient in retaining a physician qualified in the field of medicine involved, who will consult with, assist in trial preparation and testify on behalf of the patient, upon his payment of a reasonable fee to the same effect as if the physician had been engaged originally by the patient.

History: 1953 Comp., § 58-33-23, enacted by Laws 1976, ch. 2, § 23.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Experts §§ 10, 19.

Necessity of expert evidence to support an action for malpractice against a physician or surgeon, 81 A.L.R.2d 597.

Competency of general practitioner to testify as expert witness in action against specialist for medical malpractice, 31 A.L.R.3d 1163.

Competence of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality, 37 A.L.R.3d 420.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 A.L.R.3d 1084.

41-5-24. Maintenance of records.

The director shall maintain records of all proceedings before the medical review commission which shall include the nature of the acts or omissions complained of, a brief summary of the evidence presented, the decision of the panel and any majority or dissenting opinions filed. Such records shall not be made public and shall not be subject to subpoena but shall be used solely for the purpose of compiling statistical data and facilitating on-going studies of medical malpractice in New Mexico.

History: 1953 Comp., § 58-33-24, enacted by Laws 1976, ch. 2, § 24.

41-5-25. Patient's compensation fund.

A. There is created a patient's compensation fund to be collected and received by the superintendent for exclusive use for the purposes stated in the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978]. The fund and any income from it shall be held in trust, deposited in a segregated account invested and reinvested by the superintendent with the prior approval of the state board of finance, and shall not become a part of or revert to the general fund of this state. The superintendent shall have the authority to use fund money to purchase insurance for the fund and its obligations. The superintendent, as custodian of the patient's compensation fund, shall be notified by the health care provider or his insurer within thirty days of service on the health care provider of a complaint asserting a malpractice claim brought in a court in this state against the health care provider.

B. To create the fund, an annual surcharge shall be levied on all health care providers qualifying under Paragraph (1) of Subsection A of Section 41-5-5 NMSA 1978 in New Mexico. The surcharge shall be determined by the superintendent based upon sound actuarial principles using data obtained from New Mexico experience if available and shall not exceed thirty-three percent of the cost to each health care provider for his malpractice insurance or, if not insured, thirty-three percent of the average premium for practitioners in its own field or discipline. The surcharge shall be collected on the same basis as premiums by each insurer from the health care provider.

C. Such surcharge with accrued interest shall be due and payable within thirty days after the premiums for malpractice liability insurance have been received by the insurer from the health care provider in New Mexico. Before July 1, 1976, the superintendent shall send to each insurer a statement explaining the provisions of this section together with any other information necessary for their compliance with this section.

D. If the annual premium surcharge is collected but not paid within the time limited above, the certificate of authority of the insurer may be suspended until the annual premium surcharge is paid.

E. All expenses of collecting, protecting and administering the fund or of purchasing insurance for the fund shall be paid from the fund.

F. If the fund exceeds the sum of five million dollars ($5,000,000) at the end of any calendar year after the payment of all claims and expenses, the superintendent shall reduce the surcharge provided in this section in order to maintain the fund at an approximate level of five million dollars ($5,000,000).

G. Claims payable pursuant to Section 58-33-30 NMSA 1953 shall be paid in accordance with the payment schedule constructed by the court. If the fund would be exhausted by payment of all claims allowed during a particular calendar year, then the amounts paid to each patient and other parties obtaining judgments shall be prorated, with each such party receiving an amount equal to the percentage his own payment schedule bears to the total of payment schedules outstanding and payable by the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following calendar years. However, payments for medical care and related benefits shall be made before any payment made under Section 58-33-30 NMSA 1953.

H. Upon receipt of one of the proofs of authenticity listed in this subsection, reflecting a judgment for damages rendered pursuant to the Medical Malpractice Act, the superintendent shall issue or have issued warrants in accordance with the payment schedule constructed by the court and made a part of its final judgment. The only claim against the fund shall be a voucher or other appropriate request by the superintendent after he receives:

(1) a certified copy of a final judgment in excess of one hundred thousand dollars ($100,000) against a health care provider;

(2) a certified copy of a court-approved settlement or certification of settlement made prior to initiating suit, signed by both parties in excess of one hundred thousand dollars ($100,000) against a health care provider; or

(3) a certified copy of a final judgment less than one hundred thousand dollars ($100,000) and an affidavit of a health care provider or its insurer attesting that payments made pursuant to Subsection E of Section 41-5-7 NMSA 1978, combined with the monetary recovery, exceeds one hundred thousand dollars ($100,000).

History: 1953 Comp., § 58-33-35, enacted by Laws 1976, ch. 2, § 25; 1977, ch. 284, § 2.

Compiler's notes. — The reference to "Section 58-33-30 NMSA 1953" in Subsection G is to Laws 1976, ch. 2, § 30. The current reference was inserted by the 1977 amendment for "Section 30 of the Medical Malpractice Act." Section 30 was never compiled. See also catchline "Temporary provisions" in notes to 41-5-28 NMSA 1978.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-26. Malpractice coverage.

A. The filing of proof of financial responsibility with the superintendent, as provided in Section 41-5-5 NMSA 1978, shall constitute a conclusive and unqualified acceptance of the provisions of the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978].

B. Any provision in a policy attempting to limit or modify the liability of the insurer contrary to the provisions of the Medical Malpractice Act is void.

C. Every policy issued under the Medical Malpractice Act is deemed to include the following provisions:

(1) the insurer assumes all obligations to pay an award imposed against its insured under the provisions of the Medical Malpractice Act; and

(2) any termination of a policy by an insurer shall not be effective unless written notice of such termination has been mailed by certified mail to both the insured and the superintendent at least ninety days prior to the date the cancellation is to become effective, except that an insurer may terminate a policy if a billed premium payment is thirty days past due upon ten days' prior written notice mailed by certified mail to the insured of the failure of the insured to pay premiums, and an insured may terminate his policy by written request to the insurer but the effective date of termination shall be not sooner than ten days after the receipt by the insurer of the written request to terminate. In all cases when a policy is terminated for failure of the insured to pay premiums or at the request of the insured, the insurer shall notify the superintendent in writing immediately of the effective date of termination of the policy. The insurer shall remain liable for all causes of action accruing prior to the effective date of the termination, unless otherwise barred by the provisions of the Medical Malpractice Act.

History: 1953 Comp., § 58-33-26, enacted by Laws 1976, ch. 2, § 26; 1977, ch. 254, § 4.

Emergency clauses. — Laws 1977, ch. 254, § 5, makes the act effective immediately. Approved April 7, 1977.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 791 to 799.

Wrongful cancellation of medical malpractice insurance, 90 A.L.R.3d 469.

Propriety of hospital's conditioning physician's staff privileges on his carrying professional liability or malpractice insurance, 7 A.L.R.4th 1238.

41-5-27. Report by district court clerks.

Within thirty days of entry of judgment, the clerk of the district court from which judgment issues shall forward the name of every health care provider against whom a judgment is rendered under the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978] to the appropriate board of professional registration and examination for review of the fitness of the health care provider to practice his profession. In cases where judgments are entered against hospitals or other institutional health care providers, on the basis of respondeat superior or some other derivative theory of recovery, the clerk of the district court shall forward the name of the individual health care provider whose negligence caused the injury to that health care provider's board of professional registration and examination for such review. Review of the health care provider's fitness to practice shall be conducted in accordance with law.

History: 1953 Comp., § 58-33-27, enacted by Laws 1976, ch. 2, § 27.

41-5-28. Payment of medical review commission expenses.

Unless otherwise provided by law, expenses incurred in carrying out the powers, duties and functions of the New Mexico medical review commission, including the salary of the director, shall be paid by the patient's compensation fund. The superintendent, in his capacity as custodian of the patient's compensation fund, shall disburse fund money to the director upon his receipt of vouchers itemizing expenses incurred by the medical review commission. The director shall supply the chief justice of the New Mexico supreme court

with duplicates of all vouchers submitted to the superintendent. Expenses paid by the patient's compensation fund shall not exceed one hundred fifty thousand dollars ($150,000) in any single calendar year.

History: 1953 Comp., § 58-33-28, enacted by Laws 1976, ch. 2, § 28.

Emergency clauses. — Laws 1976, ch. 2, § 32, makes the act effective immediately. Approved February 27, 1976.

Applicability. — Laws 1976, ch. 2, § 29, provides that the act does not apply to malpractice occurring prior to its effective date.

Severability clauses. — Laws 1976, ch. 2, § 31, provides for the severability of the act if any part or application thereof is held invalid.

Temporary provisions. — Laws 1976, ch. 2, § 30, provides that amounts reached by settlement after the court's jurisdiction has been invoked or awarded by the jury or the court sitting without a jury and in excess of $36,000, exclusive of costs, be reduced by the court to a schedule of yearly payments which shall apply only to that portion of the judgment in excess of $35,000. The number of yearly payments and the amount shall be within the discretion of the trial court. However, the entire amount shall be paid over a period of not more than three years. The court's action shall be reviewable only in the event of an abuse of judicial discretion.

Where a malpractice claim is settled without invoking the jurisdiction of the court, the parties shall construct a payment schedule for any amount greater than $35,000. Malpractice claims to be settled for more than $100,000 shall be void, to the extent they exceed $100,000, absent the written approval of the superintendent.

After March 1, 1981 neither the parties nor the judge shall be required to schedule settlements or judgments as provided in this section. However, all judgments scheduled prior to March 1, 1981, shall continue in full force and effect.

ARTICLE 6

Professional Liability Fund Act

(Repealed by Laws 1976, ch. 5, § 15.)

41-6-1 to 41-6-14. Repealed.

Repeals. — Laws 1976, ch. 5, § 15, repeals the provisions of the Professional Liability Fund Act (former 41-6-1 to 41-6-14 NMSA 1978), effective July 1, 1981.

ARTICLE 7

Libel and Slander

Sec.
41-7-1. Limitation of tort actions based on single publication or utterance; damages recoverable.
41-7-2. Judgment as res judicata.
41-7-3. Uniformity of interpretation.
41-7-4. Short title.
41-7-5. Retroactive effect.
41-7-6. Defamation by radio and television; liability of owner, licensee or operator; compliance with federal law.

41-7-1. [Limitation of tort actions based on single publication or utterance; damages recoverable.]

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

History: 1953 Comp., § 49-27-39, enacted by Laws 1955, ch. 80, § 1; 1978 Comp., § 30-34-1, recompiled as 1978 Comp., § 41-7-1.

Compiler's notes. — Sections 41-7-1 to 41-7-6 NMSA 1978, formerly 30-34-1 to 30-34-6 NMSA 1978, have been recompiled to be included with other tort, rather than criminal, provisions.

Law reviews. — For comment on Blount v. T.D. Publishing Corp., 77 N.M. 394, 423 P.2d 421 (1966), see 8 Nat. Resources J. 348 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Libel and Slander § 183.

Conflict of laws with respect to the "single publication" rule as to defamation, invasion of privacy or similar tort, 93 A.L.R.2d 660.

Liability of telegraph or telephone company for transmitting or permitting transmission of libelous or slanderous messages, 91 A.L.R.2d 1019.